Supreme Court, U.S.
FILED

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No. 03 840 DEC 5 2003

OFFICE OF THE CLERK

In The Supreme Court of the United States

JOHN D. COWAN,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

---

PETITION FOR WRIT OF CERTIORARI

John D. Cowan
34561 Warren Quarter Road
Post Office Box 996
Wakefield, Virginia 23888
(757) 899-5058

Pro se Petitioner

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

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QUESTION PRESENTED FOR REVIEW

In direct contradiction to its holding in Commonwealth of Virginia v. Hill, 264 Va. 315, 568 S.E.2d 673 (2002), the Virginia Supreme Court has decided in this case that the Virginia Court of Appeals was correct in upholding the decision of the Circuit Court which denied Petitioner his statutory right to inquire, on voir dire, as to the prospective jurist views on the statutory range of punishment. Was Petitioner denied his right to an impartial jury with regard to applying a broad range of punishment, when the court constructively denied his attorney the opportunity to properly explore whether the jury panel was irrevocably biased toward one end or the other of the parameters?

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"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

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"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the Supreme Court of Virginia is set out in the Appendix "A", *infra*. That opinion affirmed the decision of the Court of Appeals of Virginia, which is set out in the Appendix "B", *infra*. That opinion affirmed the decision of the Circuit Court of Virginia, which is set out in the Appendix "C", *infra*.

JURISDICTION

The Supreme Court of Virginia entered judgment on Friday the 3rd day of October, 2003. Pursuant to the United States Supreme Court Rule 10(c), the Supreme Court of Virginia has decided an important question of federal law that conflicts with relevant decisions of this Court and therefore Petitioner is seeking review. Jurisdiction for this Honorable Court is invoked under 28 U.S.C. §1257 (a).

STATEMENT OF THE CASE

Petitioner, John D. Cowan, is a self-employed businessman and a resident of Southampton County, Virginia. (Tr. at p. 92). On March 18, 2002, a Grand Jury in Southampton County, Virginia, indicted Petitioner on a charge of Possession of a Firearm by a convicted felon in violation of Section 18.2-308.2(A) of the Code of Virginia, 1950, as amended. Petitioner was tried on these charges before the Circuit Court of the County of Southampton, Virginia, with the Honorable Westbrook J. Parker presiding. On September 24, 2002, (after a one day trial) the jury found Mr. Cowan guilty. (Tr. at p.130). He was subsequently released on his own recognizance, on appeal bond, until his sentencing hearing on November 14, 2002. (Tr. at p.133). Judge Parker sentenced Mr. Cowan to 2 years imprisonment, the mandatory minimum under the terms of the statute. (Sent. Tr. at p.5). Petitioner filed a timely appeal to the Court of Appeals of Virginia. The appeal was denied and a timely appeal was filed in the Supreme Court of Virginia, which was denied on Friday, the 3rd day of October, 2003. From those decisions, the Petitioner now files this Petition for Writ of Certiorari.

ARGUMENT

The Supreme Court of Virginia directly contradicted established case law and a mandatory statute which allows a defendant, during voir dire, to ask relevant questions of a prospective jurist that would lead to the disclosure of prejudice, when it upheld the rulings of both the Court of Appeals of Virginia and the Circuit Court of the County of Southampton.

Petitioner claims that the Supreme Court of Virginia failed to recognize plain error committed by the Court of Appeals of Virginia when it upheld a decision from the Circuit Court prohibiting Petitioner's counsel from questioning the prospective jurists' views on the statutory range of punishment. It is well settled law that a defendant is entitled to an impartial jury on the question of punishment as well as guilt. Patterson v. Commonwealth, 222 Va. 653, 658, 283 S.E.2d 212, 215 (1981).

Section 8.01-358 of the Code of Virginia, 1950 as amended, states:

> "the court and counsel for either party shall have the right to examine under oath any person who is called as a juror therein and shall have the right to ask such person or juror directly any relevant question to ascertain whether he is related to either party, or has any interest in the cause, or has expressed or formed any opinion, or is sensible of any bias or prejudice therein; and the party objecting to any juror may introduce any competent evidence in support of the objection; and if it shall appear to the court that the juror does not stand indifferent in the cause, another shall be drawn or called and placed in his stead for the trial of that case."

Voir dire is further governed by Virginia Supreme Court Rule 3A:14, which states, in pertinent part:

(a) Examination - After the prospective jurors are sworn on the voir dire, the court shall question them individually or collectively to determine whether anyone : -

(6) Has a bias or prejudice against the Commonwealth or the accused; or

(7) Has any reason to believe he might not give a fair and impartial trial to the Commonwealth and the accused based solely on the law and the evidence.

It was determined by this Honorable Court in Duncan v. Louisiana, 391 U.S. 145, 149, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968), that a criminal defendant is guaranteed an impartial jury by the Sixth Amendment to the United States Constitution, which is applicable to the states by virtue of the Fourteenth Amendment. This Honorable Court also went on to state that the principals of due process, embodied in the Fourteenth Amendment to the United States Constitution, also guarantee a defendant's right to an impartial jury. Ristaino v. Ross, 424 U.S. 589, 595 96 S. Ct. 1017, 1020 47 L. Ed. 2d 258 (1976).

Applying that holding, the Supreme Court of Virginia, in Martin v. Commonwealth, 272 Va. 436, 445 271 S.E 2d 122, 128 (1980), held that the constitutional and statutory guarantee of an impartial jury is no mere legal technicality, but a substantive right scrupulously to be observed in the day-to-day administration of justice. The court then went on to state that, voir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored. Quoting, Rosales-Lopez v. United States,451 U.S. 182, 188, 101 S. Ct. 1629, 1634, 68 L. Ed. 2d 22 (1981). It was additionally reasoned by the Supreme Court of Virginia, that trial courts must afford a party a "full and fair" opportunity to

ascertain whether prospective jurors "stand indifferent in the cause." LeVasseur v. Commonwealth, 225 Va. 564, 581, 304 S.E.2d 644 (1983).

In the present case, Petitioner clearly was not afforded a "full and fair" opportunity to ascertain whether his prospective jurors would be able to stand indifferent in his cause. The Trial Court did not allow Petitioner's attorney to determine the impartiality of the jury by questioning them on the question of punishment. (Tr. at pps. 5,6). That was in direct contradiction to the governing statute, Section 8.01-358 of the Code of Virginia, 1950 as amended, which states in pertinent part that "a party shall have the right to ask ... any relevant question to ascertain ... bias or prejudice." In addition, it was held by the Supreme Court of Virginia in Commonwealth of Virginia v. Hill, 264 Va. 315, 568 S.E.2d 673 (2002), that a defendant has the right, during voir dire, to ask relevant questions that, among other things, would lead to the disclosure of prejudice. The trial court did not allow Petitioner such an opportunity. It can be reasonably assumed that it would be important to know, prior to trial, if a prospective juror was opposed to mandatory sentences for crimes.

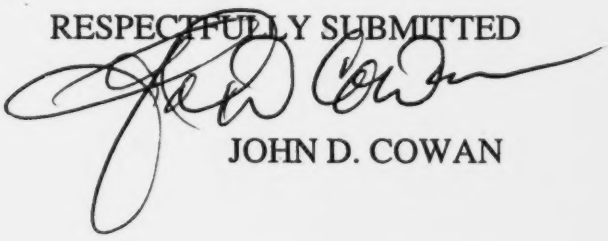
In cases involving the death penalty, jurists are asked during voir dire if they would be able to sentence an individual to the death penalty. The same should apply here. In order for an individual to receive a fair and impartial trial, it has been decided by the legislature, case law, and court rules (specifically) that an individual is entitled to question prospective jurists as to bias or prejudice.

Furthermore, it is evidenced in the trial transcript that members of Petitioner's jury potentially were biased or prejudiced to imposing mandatory sentences, because the jury foreman came out of deliberations to specifically ask the judge if a "less sentence" could be imposed. (Tr. at p.129).

CONCLUSION

The Supreme Court of Virginia has blatantly ignored case precedent established by this Honorable Court. In addition, it has disregarded its own holding in Hill. Furthermore, it has denied Petitioner his rights guaranteed to all citizens under the Sixth Amendment to the United States Constitution. In doing so, it has improperly upheld the ruling of the trial court which erred in denying Petitioner the opportunity to ask specific questions of his prospective jurists concerning bias or prejudice during voir dire, thereby, violating his Sixth Amendment rights. Accordingly, this Honorable Court should overrule the decisions of the trial and appeallate courts and remand this case to the trial court with an order for a new trial.

RESPECTFULLY SUBMITTED



JOHN D. COWAN

APPENDIX

APPENDIX A

IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

PETITION FOR APPEAL

RECORD NO. 031375

DATE OF ENTRY: June 11, 2003

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court refuses the petition for appeal.

A Copy,

Teste:

Patricia H. Krueger, Clerk

By: "s/_____".
Deputy Clerk

APPENDIX B

IN THE
COURT OF APPEALS OF VIRGINIA
AT RICHMOND

PETITION FOR APPEAL

RECORD NO. 3028-02-1

DATE OF ENTRY: February 11, 2003

From the Circuit Court of Southampton County
Before Judge Rudolph Bumgardner, III

This petition for appeal has been reviewed pursuant to Code §17.1-407 (C) and is denied for the following reason:

Appellant objected to the cross-examination of James Pritchard, stating only that it was "going pretty far afield." On appeal, Appellant argues that the prosecutor's questioning improperly sought information regarding a specific instance of misconduct that was not the subject of a criminal complaint or general rumor.

Rule 5A:18 requires that objections to a trial court's action or ruling be made with specificity in order to preserve an issue for appeal. See Campbell v. Commonwealth, 12 Va. App. 476, 480, 405 S.E.2d 1, 2 (1991) (en banc). A trial court must be alerted to the precise issue to which a party objects. See Neal v. Commonwealth, 15 Va. App. 416, 422-23, 425 S.E.2d 521, 525 (1992).

Appellant's objection that the cross-examination was "pretty far afield" was insufficient to alert the trial court to the precise question raised on appeal. Because the requirements of Rule 5A:18 have not been met, we will not consider this question on appeal. Moreover, the record does not reflect any

reason to invoke the good cause or ends of justice exception to Rule 5A:18.

This order is final for purposes of appeal unless, within fourteen days from the date of this order, there are further proceedings pursuant to Code §17.1-407(D) and Rule 5A:15(a). If Appellant files a demand for consideration by a three-judge panel, the demand should include a statement, not to exceed one typewritten page, identifying how this order is in error.

This Court's records reflect that Richard E. Railey, Jr., Esquire, is counsel of record for Appellant in this matter.

A Copy,

Teste:

Cynthia L. McCoy, Clerk

By: "s/_____"
Deputy Clerk

APPENDIX C

IN THE
CIRCUIT COURT OF THE COUNTY OF
SOUTHAMPTON

SENTENCING HEARING

RECORD NO. CR02-128

DATE OF ENTRY: December 18, 2002

TRANSCRIPT of the testimony, and other incidents in the sentencing hearing of the above styled matter, as heard on November 14, 2002, before the Honorable Westbrook J. Parker, Judge.

(Sentencing transcript, at p.5 lines 1-7).

THE COURT: And I know the jury– it's interesting that the jury, for the record, on the verdict form they said a minimum of two years and it's obvious they didn't want to impose the minimum they had to impose, and that's what I have to do. So what I've got to do is sentence you to two years in the penitentiary.

CERTIFICATE

I, Susan E. Goodwin, hereby certify that I, having been duly sworn, was the court reporter in the Circuit Court of the County of Southampton, Virginia, on November 14, 2002, at the time of the matter recorded herein.

I further certify that I have transcribed the proceedings faithfully and accurately, to the best of my ability.

Given under my hand this 18th day of December 2002.

"s/_____"
Court Reporter